

The findings and conclusions of the Administrative Law Judge as set forth in her Award dated January 18, 1995 are generally not disputed by the parties. Claimant injured her back on November 10, 1993 while working on an assigned job at Vlassis Inserts while employed by respondent, Smith Temporary Services. Claimant gave immediate notice of

the accident to the respondent. She was subsequently treated conservatively by Stephen Ozanne, M.D., an orthopedic surgeon of Wichita, Kansas. Dr. Ozanne released the claimant with permanent work restrictions and a functional impairment rating of eleven percent (11%) on May 31, 1994.

From November 11, 1993 through May 31, 1994, claimant was under doctor's care, and unable to work, except for a period of time when she returned to work for the respondent on light duty. The evidentiary record is not entirely clear on the exact amount of time that the claimant did return to work for the respondent during this period. The Administrative Law Judge found that claimant had worked two (2) weeks, while the respondent asserts that the claimant worked two and one-half (2½) weeks. The Appeals Board finds that the best evidence in the record that establishes the amount of time claimant worked on light duty is contained in the claimant's testimony. Claimant testified that in March of 1994 she worked two and one-half (2½) weeks for the respondent. Part of this time was performing secretarial work in the office of the respondent and the balance of the time she was assigned to work for Criss Optical. She was not able to continue working for Criss Optical because the job duties aggravated her back injury.

Accordingly, the Appeals Board finds that the claimant was temporarily totally disabled from the date of her injury, November 10, 1993, except for a two and one-half (2½) week period in March of 1994 when she returned to light work for the respondent, until she was released to return to work having met maximum medical improvement with permanent restrictions on May 31, 1994. This constitutes a total of 28.86 weeks minus the two and one-half (2½) weeks the claimant returned to work, for a total of 26.36 weeks that claimant should have been paid temporary total disability benefits.

The Administrative Law Judge calculated the Award as follows:

"The Claimant is entitled to 20.86 weeks temporary total disability at the rate of \$133.34 per week or \$2,781.47 followed by 37.61 weeks at \$133.34 per week or \$5,014.92 for a 79% permanent partial general body disability from November 10, 1993 through October 26, 1994. (This is less the two weeks the Claimant worked during this period). Then the Claimant is entitled to 37.84 weeks at \$133.34 for an 11% permanent partial general body disability for a total of \$5,045.59, for a grand total of \$12,841.98.

"As of January 18, 1995 there would be due and owing to the Claimant 20.86 weeks of temporary total compensation at \$133.34 per week in the sum of \$2,781.47 plus 41.14 weeks of permanent partial compensation at \$133.34 per week in the sum of \$5,485.61 for a total due and owing of \$8,267.08 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$4,574.90 shall be paid at \$133.34 per week for 34.31 weeks or until further order of the Director."

The thrust of respondent's argument concerning the correct calculation of this Award is that the "new act" calculation of permanent partial general disability which is contained in K.S.A. 44-510e(a), prohibits work disability to be awarded up to a certain point of employment and thereafter recovery for permanent partial general disability be based on functional impairment. Respondent contends that there is no statutory authority for the same and to allow such recovery would be a mathematical nightmare. The respondent contends that in this case claimant's disability should be limited to eleven percent (11%) permanent partial general disability based on functional impairment. Respondent alleges that the correct amount of the award in this case should be \$5,502.87.

The Appeals Board recognizes that the "new act" does not address how to calculate benefits payable for an injury when the disability rate changes for that injury. In the instant

case, the evidence has established that the claimant is entitled to temporary total disability benefits from the date of injury, November 10, 1993, until released with permanent restrictions on May 31, 1994, less two and one-half (2½) weeks of returning to light duty. Thereafter, claimant was unable to find work at ninety percent (90%) of her pre-injury wage until the respondent returned her to accommodated employment on October 27, 1994. During this period of time claimant is entitled to permanent partial general disability benefits based on evidence of work disability, if higher than the stipulated functional rating of eleven percent (11%). The evidence established that the claimant was entitled a seventy-nine percent (79%) permanent partial general work disability. On October 27, 1994, respondent returned claimant to an accommodated job at ninety percent (90%) of her pre-injury wage which then limited her to permanent partial general disability benefits of eleven percent (11%) based on functional impairment. Under the pre-1993 calculation, the change in disability rate meant a change in the weekly rate of the remaining weeks. The calculation used for injuries sustained after July 1, 1993 does not lend itself so easily to a change. Nevertheless, contrary to respondent's assertion in this case, the Appeals Board concludes that more than one (1) disability rate may, in the circumstances alluded to above, be applicable to the same injury even under the "new act".

There are several possible methods of calculating the Award when there is a change in the disability rate. After considering the various options, the Appeals Board concludes the most equitable method is to calculate the award, or recalculate the award if benefits have already been paid based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits have been paid or were payable under any earlier disability rate. The award, so calculated, gives the total number of weeks and amounts payable for the award. If permanent partial benefits have previously been paid, based on a different rate of disability, respondent is entitled to a credit for those payments. If the disability rate goes down, as when the claimant returns to work after being off for a period of time, and if the new calculation on the new rating results in fewer weeks than respondent has previously paid, respondent owes nothing more. If the disability rate goes up, as when the claimant is laid off, a new work disability rate is calculated based on 415 weeks (less deduction for temporary total paid over 15 weeks) and the number of weeks of permanent partial benefits paid based on the lower rate is credited against amounts due. The last disability rate or amounts already paid, if higher, become the ceiling on the benefits awarded. For example, in this case, a seventy-nine percent (79%) work disability gives 318.88 weeks of benefits which will be the ceiling for this injury if the percent of work disability remains the same. If the respondent would fail to continue to provide the claimant with accommodated employment at ninety percent (90%) of her pre-injury wage, then the claimant could be entitled up to an additional 274.48 weeks based on a work disability of seventy-nine percent (79%).

Alternatives to the method described above would include deduction of weeks paid or weeks lapsed from the date of injury from 415 before applying the new percentage disability to the number of weeks. These methods, however, produce erratic and sometimes inequitable results. The method adopted here, in our opinion, adheres most closely to the intended operation of the calculation as enacted.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated January 18, 1995, is hereby, modified, and an Award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Sandra L. Romeo, and against

the respondent, Smith Temporary Services, and its insurance carrier, Fidelity & Casualty Company of New York.

The claimant is entitled to 26.36 weeks of temporary total disability compensation at the rate of \$133.34 per week or \$3,514.84, followed by 21.14 weeks at \$133.34 or \$2,818.81 for a 79% permanent partial general work disability, making a total of \$6,333.65.

Commencing October 27, 1994, claimant is entitled to 23.26 weeks at the rate of \$133.34 per week or \$3,101.49, for an 11% permanent partial general functional disability, making a total award of \$9,435.14.

As of December 15, 1995, there would be due and owing to the claimant 26.36 weeks of temporary total disability compensation at \$133.34 per week in the sum of \$3514.84, plus 21.14 weeks of permanent partial general work disability compensation at \$133.34 per week in the sum of \$2,818.81, plus 23.26 weeks of permanent partial general functional disability compensation at \$133.34 per week in the sum of \$3,101.49, for a total due and owing of \$9,435.14 which is ordered paid in one lump sum less any amounts previously paid.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with their counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Court Reporting Service	
Deposition of Sandra Romeo	Unknown
Deposition of Karen Crist Terrill	\$ 91.35
Deposition of Gregg Russell	\$ 77.35
Deposition Services	
Transcript of Regular Hearing	\$131.70
Kelley, York & Associates, Ltd.	
Deposition of Jerry D. Hardin	\$148.60
Deposition of Ernest R. Schlachter, M.D.	\$124.90

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, Kansas
Michael D. Streit, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director